Potential Areas for Motions *in Limine:*

A. Defendant's instruction incorrectly references "impairment."

A.R.S. § 28-1381(A)(3) does not require proof of demonstrable impairment. Instead, it requires proof of a drug that *may* impair. "The state has a compelling legitimate interest in protecting the public from drivers whose ability *may be* impaired by the consumption of controlled substances." *State v. Phillips*, 178 Ariz. 368, 372 (Ct. App. 1994) (*emphasis added*). "Violations of § 28-1381(A)(3) include, but are not limited to, situations in which drivers have a non-impairing amount of certain drugs in their bodies." *Dobson* at ¶17. "Section (A)(3) thus casts a net that embraces drivers who have proscribed drugs or their impairing metabolites in their bodies but who may or may not be impaired." *Dobson* at ¶16.

The AMMA–authorized affirmative defense to A.R.S. § 28-1381(A)(3) does not contemplate proof of impairment either. Like the underlying offense, it contemplates capacity or "sufficiency" to impair. A.R.S. § 36-2802, which begins with a presumption that driving under the influence is **not** authorized, is not intended to shield all AMMA program participants from *per se* prosecution – which would have been accomplished with a flat ban on the (A)(3) charge. Instead, the drafters of the AMMA decided to protect a very specific subset of (A)(3) DUI defendants – those AMMA program participants with no demonstrable impairment and reported drug concentrations so small that they *could not have* caused impairment. As the Court recognized in both *Harris* and *Dobson*, these people would otherwise be subject to prosecution. (And it is worth remembering, the AMMA was passed four years before *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343 (2014)).

A. Drug concentration sufficiency is a scientific principle, and cannot be evaluated without expert or other scientific evidence.

The sufficiency or insufficiency of a drug concentration to cause impairment is a complicated scientific determination involving the characteristics, potency, and quantity of the involved drug. This is not the type of information that is "of such common knowledge that people of ordinary education could reach a conclusion as intelligently" as a trained expert. *State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975). "Ordinary education" does not equip a person with extensive knowledge of drug potency, variation, or effect on brain function. "Ordinary education" does not even give most people a good grasp of the principles of measurement involved in this type of analysis. (Drug concentrations like the one involved here are reported in ng/ml, or billionths of a gram per thousandth of a liter).

For many drugs, including marijuana, the "sufficiency to cause impairment" analysis is so complicated that the identification of an "impairing concentration" eludes even trained scientists.

> [U]nlike alcohol, there is no generally applicable concentration that can be identified as an indicator of impairment for illegal drugs. [*State v.*] *Phillips*, 178 Ariz. [368] at 372, 873 P.2d [706] at 710[(App. 2004)] (explaining that drugs' potency cannot be accurately predicted); see also Gary M. Reisfield et al., The Mirage of Impairing Drug Concentration Thresholds: A Rationale for Zero Tolerance Per Se Driving under the Influence of Drugs Laws, 36 J. Analytical Toxicology 353 (2012) (explaining that multiple phenomena make the task of establishing impairing concentrations impossible).
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> *Harris,* 234 Ariz. 343, 347. *See also Dobson*, at ¶21.

If any undisclosed lay witness, including Defendant, plans to testify that his expertise in marijuana is so extensive that he has identified a cutoff that so far eludes the entire scientific community, the State requests a *Daubert* hearing (the State would also object, at this point, for lack of disclosure). Otherwise, the State requests that any non-or pseudo-scientific testimony or argument on this issue be precluded.

A. The AMMA contains an affirmative defense based on marijuana concentration, regardless of actual demonstrated impairment of the medical marijuana user.

Arizona DUI laws apply to marijuana, and to medical marijuana. *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343, 347 (2014). A.R.S. § 28-1381(A)(3) prohibits driving with specific drugs in a person's body. This statute applies regardless of the quantity of the drug, and regardless of the actual effect of the drug on the driver. *See Dobson*, at ¶17 ("Violations of § 28-1381(A)(3) include, but are not limited to, situations in which drivers have a non-impairing amount of certain drugs in their bodies"); *Dobson*, at ¶16 ("Section (A)(3) thus casts a net that embraces drivers who have proscribed drugs or their impairing metabolites in their bodies but who may or may not be impaired").

Dobson held that a person using medical marijuana under the AMMA could be prosecuted for A.R.S. § 28-1381(A)(3). Under the (A)(3) statute, it does not matter if the person is or is not impaired by the marijuana in their system, so a medical marijuana user can be found guilty for having any amount of marijuana's active components in his body, without additional proof that those components impaired him/her. *Id.*

Even though a medical marijuana user can be prosecuted under (A)(3), the Supreme Court also found that A.R.S. § 36-2802(D) of the AMMA affords an affirmative defense to a charge of A.R.S. § 28-1381(A)(3). A lawful medical marijuana user shall not be considered under the influence if the concentration of the drug is insufficient to cause impairment, "and thus cannot be convicted under (A)(3)." *Id.* at ¶ 19. (A)(3) concerns the impairing potential of a drug, and this affirmative defense is specific to the (A)(3) charge; as such, the affirmative defense necessarily concerns the impairing potential of a drug concentration.

Since "there is no generally applicable concentration that can be identified as an indicator of impairment" the court explained that the burden was on the user, because the "risk of uncertainty" should be on the users who "generally know or should know if they are impaired and can control when they drive." *Id.* This is the only time the *Dobson* court mentions a medical marijuana user being impaired and it is not in the context of the factual requirements for the affirmative defense. It is only in the context of explaining that the burden is on the user because they, not the public, should bear the risk of uncertainty, that the court mentions a user's unique position to recognize and guard against his own impairment.[1] This is the justification ***for*** the affirmative defense – the policy reasons for placing the risk where it is. The Court's focus in describing the working ***of*** the affirmative defense is always on the concentration and whether the concentration of the drug was sufficient to cause impairment.

A. The plain language of the AMMA and of the affirmative defense show that Defendant must prove insufficiency to cause impairment irrespective of the Defendant's personal experience or characteristics.

The specific phrasing of A.R.S. § 36-2802(D) – repeated by the *Dobson* court in varying forms – is that a "qualifying patient shall not be considered under the influence of marijuana solely because of the presence of … marijuana that appear[s] in insufficient concentration to cause impairment." *See Id.* at ¶¶ 15, 17, 19, 20, 21, 22, and 23. In the phrase "in insufficient concentration to cause impairment," the words "insufficient to cause impairment" are modifying the word "concentration." Therefore, this phrase means "a concentration which is insufficient to cause impairment."

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[1] That the risk of uncertainty is on the user in DUI situations has long been recognized by Arizona courts. *State v. George*, 233 Ariz. 400, 313 P3d 543 (App. 2013); *State v. Parker*, 136 Ariz. 474, 666 P.2d 1083 (App. 1983).

Given that the plain meaning of the word "sufficient" is "adequate," "enough," or "as much as needed," insufficient would mean "not enough" or "inadequate." *The American Heritage Dictionary, Second College Edition*, 1985, p. 1216, 667. Accordingly, the language used by the Supreme Court in finding an affirmative defense speaks of a marijuana **concentration** that is not enough or is inadequate to bring about or cause impairment. This clause does not modify "qualifying patient" but instead is part of a prepositional phrase starting with "because of" that explains why the qualifying patient is not to be considered under the influence. An AMMA cardholder is considered not under the influence if the marijuana **concentration itself** is insufficient to cause impairment. The plain language says nothing about a qualifying patient being actually impaired or not. The affirmative defense results in a lawful user not being considered impaired, but this only occurs if it is proven that the marijuana concentration itself is insufficient to cause impairment, regardless of the specific individual.